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90-1320

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

ROBERT CRAIG
FRANK P. NORTH, JR.
ESTATE OF JACK E. WALKER
PETER V. PAPPAS,

Petitioners

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Edward J. Calihan, Jr.
Patrick J. Calihan
53 W. Jackson Blvd
Chicago, Il. 60604-3606
(312) 922-3113

QUESTIONS PRESENTED

1. Whether the Seventh Circuit Court of Appeals requirement for relief under a writ of error coram nobis for all practical effect denies relief to a Petitioner unless he is still incarcerated under a wrongful conviction, or actually is suffering from a present disability and harm stemming from a wrongful conviction.

2. Whether the decision in this case is inconsistent with other cases within this Circuit, cases within the Fourth and Ninth Circuits and in conflict with cases cited by the United States Supreme Court.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

PRAYER

The Petitioners, Robert Craig and Peter

V. Pappas, Defendants-Appellants, and Frank P. North, Jr. and the Estate of Jack Walker, Defendants-Appellees in the Court below, respectfully pray that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the Seventh Circuit entered in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit denying a writ of error coram nobis is officially reported at 907 F.2d 653, (7th Cir., 1990) and is reproduced hereto (App. A).

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit was filed on July 16, 1990. (App. A & B) A Petition for Rehearing and Suggestions for Rehearing **en banc**, timely made, was denied on November 13, 1990 (App. C). This Petition

is filed within 90 days thereof. The jurisdiction of this Court is invoked under Title 28 U.S.C. #1254(1).

FEDERAL STATUTORY PROVISIONS

28 U.S.C. Sec. 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) As alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. **June 25, 1948, c. 646, 62 Stat. 944: May 24, 1949, c. 139, #90, 63 Stat. 107.**

List of Parties to this Proceeding

The caption of this case in this Court contains the names of all parties.

STATEMENT OF THE CASE.

The Proceedings Below.

Petitioners were originally charged in a multiple-count indictment. Count 1 charged a conspiracy to commit mail fraud, Counts 2-12 charged the mailings, and Counts 13-14 charged only Pappas and Craig of these Petitioners with interstate travel with intent to promote an unlawful activity. The conspiracy Count listed overt acts of mailings and travel in furtherance of the conspiracy. After a jury trial, Petitioners were found guilty of 18 U.S.C. 371, 1341 and 1952 on July 25, 1976.

The Seventh Circuit affirmed by a 2-1 decision, Judge Swygert filing a vigorous dissent. The Supreme Court denied certiorari.[1]

The Trial Court considered a Coram Nobis Petition to vacate prior convictions in reliance upon **McNally** v. **United States**, 102 S.Ct. 2875 (1987).

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[1] **United States** v. **Craig, et al.**, 573 F.2d 455 (7th Cir. 1977), cert. denied, 99 S.Ct. 82 (1978).

The Trial Court held that **McNally** relief was available as to the 12 Mail Fraud/Conspiracy Counts and granted relief to North and Walker, but denied relief to Craig and Pappas on other grounds. The Trial Court's Opinion and denial of rehearing is attached hereto as App. D. Cross appeals were taken from his ruling.

The United States Court of Appeals for the Seventh Circuit, while agreeing that **McNally** was applicable to the Mail Fraud/Conspiracy Counts, denied relief to all the Petitioners, relying upon the **Keane** case. **United States** v. **Keane**, 852 F.2d 199 (7th Cir. 1989), Dec. 7-5-88, and did not reach any consideration of the other grounds as to Pappas and Craig.

STATEMENT OF FACTS

The Court below by its decision refused to review the fact issue raised by Petitioner

Pappas and Craig as appellants in this case on the question of whether Counts XIII and XIV could stand alone. The Seventh Circuit in the original appeal from the convictions in 1977 ruled that Pappas and Craig were guilty under those counts only because there was adequate proof that they were co-conspirators under Counts I and II, both of which were based on the **"intangible rights"** theory. Pappas and Craig had originally raised the complete lack of proof on Counts XIII and XIV. No independent proof supported their conviction -- only the co-conspiracy theory on the intangible rights counts were relied upon by the government.[1]

On the Petition for Writ of Error Coram

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[1]Detailed recitation of the facts may be found in the opinion of the trial court (App. D) and in the opinion of the Seventh Circuit (App. A). The most detailed recitation of the facts may be found in the opinion of the Seventh Circuit in the original case in 1977 (573 F.2d 455 (7th Cir. 1977).

Nobis the Trial Court ruled that Counts XIII and XIV could stand alone. It was for this ruling that Pappas and Craig appealed, and the government appealed from the Trial Court's ruling that McNally was applicable, and that North and the Estate of Walker (Mrs. Walker) were entitled to coram nobis relief.

The Court below ruled as follows:

> "IV CONCLUSION
>
> "We have affirmed our holding that estates lack standing to bring coram nobis petitions on behalf of their decedents. We have also stuck to our precedents on coram nobis petitioners' need to show continuing disabilities from their allegedly erroneous convictions. Because we found all of the petitioners' disabilities lack merit, we have declined to reach the government's alternate argument that Craig's and Pappas's Travel Act convictions can stand independent of any invalid mail fraud counts. Accordingly, the Walker estate's appeal is dismissed for want of subject-matter jurisdiction; the judgment of the district court denying a writ of error coram nobis to Robert Craig and Peter V. Pappas is affirmed; and the judgment of the district court granting a writ of error coram nobis to Frank P. North, Jr., is reversed.

"DISMISSED IN PART,
"AFFIRMED IN PART, AND
"REVERSED IN PART"

Reasons for Granting the Writ

The United States Court of Appeals for the Seventh Circuit has rendered a decision in admitted conflict with decisions of the Fourth and Ninth Circuit Court of Appeals and also, as Petitioners contend, in conflict with this Court's decision in **United States** v. **Morgan**, 74 S.Ct. 247 (1954) and **Pollard** v. **United States**, 77 S.Ct. 481, 484 (1956). We respectfully pray that the Court exercise its power of supervision.

ARGUMENT

The question posed is whether Coram Nobis relief is ever available in the Seventh Circuit and particularly to petitioners who have served their sentences imposed by the erroneous conviction or have **actually** suffered a disability.

We note that various panels within the Seventh Circuit apply **McNally** where the petitioner is in custody or on parole. We refer to **Toulabi** v. **United States**, No. 88-273, Dec. May 15, 1989, 875 F.2d 122, the panel consisting of Judges Posner, Esterbrook and Ripple and to **Magnuson** v. **United States**, No. 88-2802, Dec. Nov. 8, 1988, 861 F.2d 166, the panel consisting of Esterbrook, Manion and Gordon. But when the petitioner has served his sentence and been paroled, the Court below vigorously applied **United States** v. **Keane**, 852 F.2d 199 (1989) and the lingering stigma of the incarceration and the results of the conviction are ignored.

We submit that nothing in **United States** v. **Morgan**, 74 S.Ct. 247 (1954) would support the concept that a procedural barrier should result in denial of due process. Rather **Morgan** is noted as the key case establishing

the viability of coram nobis in the Federal Courts based upon the principle that Federal courts should act to do justice if the record makes plain that a petitioner has been the victim of an erroneous conviction.

We submit these petitioners in reliance upon **McNally**, have a right to relief, and a procedural barrier should not be imposed to defeat that right.

We respectfully ask that this Circuit grant certiorari to assure that constitutional due process rights are honored, rather than frustrated.

The Court below recognized that other Circuits differ. At p. 10 of its Opinion the following is stated:

> **"Our restrictive view of the writ's availability is not shared by all circuits. Both the Fourth nd Ninth Circuits apparently do not require any showing of a disability before a writ of error coram nobis may issue. See United States v. Walgren, 885 F.2d 1417, 1421 (9th Cir. 1989) (applying 'liberal'**

presumption that all criminal convictions carry adverse consequences); United States v. Mandel, 862 F.2d 1067, 1075 & n. 12 (4th Cir. 1988) (all felony convictions impose a status upon the person) cert. denied, 109 S.Ct. 3190 (1989); Hirabayashi v. United States, 828 F.2d 591, 606-07 (9th Cir. 1987) ('Any judgment of misconduct has consequences for which one may be legally or professionally accountable.') see also United States v. McClelland, 732 F.Supp. 1534, 1537 (D.Nev. 1989) ('In the Ninth Circuit, there is no need for petitioner to show specific adverse consequences that he presently is suffering or that he is likely to suffer in the future.') In dictum, however, the Third Circuit has hinted that it might follow our more restrictive view. See United States v. Osser, 864 F.2d 1056, 1060 (3rd Cir. 1988) (admitting to some uncertainty as to whether the loss of a pension is a sufficient disability). We noted these differences in Bush and observed that the Supreme Court has obviously believed this split among the circuits tolerable. 888 F.2d at 1148-49. Just as we did before, we will continue to adhere to our own precedents until the Supreme Court changes the law or cogent argument convinces us otherwise.3 Id. at 1149." (Opn. pp. 10-11) (Footnotes omitted) (emphasis supplied)

Note: It would appear that an additional reason for granting Writ is the indecision of the Third Circuit in the

above-cited United States v. Osser, 864 F.2d 1056, 1060 (3rd Cir. 1988).

The Court below erred in holding that none of the petitioners advanced civil disabilities that would justify issuance of the writ. The Court below stated that there had to be a 'concrete threat' that the erroneous convictions which would cause harm to the petitioners. That there had to be a **"present harm"** and that a **"potential harm"** had to be more than incidental. It polished off the petitioners' claims as being **"speculative"**.

On all counts, the erroneous convictions caused harm to the petitioners. They submitted Briefs to the Trial Court in response to the government's pleadings, detailing a substantial list of lingering continuing civil disabilities, including without limitation, prohibition from seeking

public office, a ban against public employment with governmental agencies, barriers against a host of fields in the private sector, prohibition against bearing arms, and disbarment from the practice of law. All were present and continuing. The most obvious disability is the possible impairment of the credibility of such person as the result of an unlawful fraud conviction. (Rule 609 F.R. of E, for example. The Trial Court held that there were lingering civil disabilities and granted relief on this issue. The Court below reversed.

In a footnote at p. 11 of the Opinion of the Court below reference is made to **Sibron** v. **State of New York**, 392 U.S. 40, 88 S.Ct. 1889 (1968). We are at a loss to understand why the lower court would cite it in support of these conclusions. The **Sibron** case details **Pollard**, and **Morgan** and other Supreme Court

cases in support of Petitioner's contentions.

Disabilities

Singling out Pappas' disbarment, the Court below on one hand complained that Pappas had not supplied evidence that he had re-applied to practice law, and, on the other hand, said that even if he had, this Court would still deny him relief. Noting Footnote 4 at the bottom of p. 12, this Court suggests that Pappas sought improperly to supplement the record. The fact is that the original petition pre-dated **Keane** and thus did not address the disbarment or civil disabilities. It was addressed in response to the pleadings of the government in the Amended Complaint from which these proceedings arose. The Trial Court found it unnecessary to hold any Evidentiary Hearing on the subject of re-application. Pappas and the Court had no view into the future.

The fact is that both Walker(deceased) and Pappas were disbarred pursuant to Illinois Supreme Court Rules as a direct result of the erroneous conviction.

Pappas is still disbarred. North and Walker suffered a loss of pensions. These are all real, continuing disabilities. They are not speculative by any stretch of the imagination.

If the Court below felt that there was some doubt as to these disabilities, we submit that doubt should be resolved in favor of the petitioners since the right to set aside an erroneous conviction is vital to due process. We submit there is no doubt here, particularly when consideration is given to the fact that all these petitioners are still **"ex-cons"**, and have served in prison for this conviction.

As to the Walker Matter

The Trial Court granted relief. The

Court below reversed on grounds of lack of "**standing**", that only Jack Walker could bring this action and he was dead, and cited **United States** v. **Kerner**, 895 F.2d 1159 (7th Cir.).

It was argued below that there was "**standing**", and that **Kerner** was not applicable, because Mrs. Kerner had predeceased her husband. Thus, the rights of the widow were not considered in **Kerner**.

A widow has pension rights **ab initio** before her husband passes away and they become payable to her upon the death of the husband. State law supports Mrs. Walker, as does the Illinois Constitution, as cited in the Briefs.

The effect of the erroneous conviction survived Jack Walker's death, and continue as a lingering civil disability.

Mrs. Walker and the Estate have standing, have suffered a loss as a direct result of the erroneous conviction and relief should be

considered and granted here. It does not appear to be available in the State Courts as long as that conviction stands. Only this Court can grant relief to right the wrong.

CONCLUSION

What this case stands for is that a wrongfully convicted person cannot have his conviction set aside until he is actually harmed by its presence on his record. There just isn't any doubt that Pappas will petition the Illinois Supreme Court for reinstatement. Yet, his petition will have to deal with this unlawful conviction. Mrs. Walker must now turn to civil litigation in State Courts. Yet both will be litigating a matter which should be determined by a federal court, to wit: a wrongful federal conviction. The Illinois Courts cannot set it aside, no more than can a federal Court reinstate Pappas or give Mrs. Walker her Pension. Both the Federal and

State Courts are involved. It takes action by both courts to resolve the wrong suffered.

WHEREFORE, for the above and foregoing reasons, Petitioners respectfully pray that this Honorable Court issue its writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

EDWARD J. CALIHAN, JR.
PATRICK J. CALIHAN
53 W. Jackson Blvd.
Chicago, Il. 60604-3606
(312) 922-3113

APPENDIX

Appendix A

In the

United States Court of Appeals

For the Seventh Circuit

No. 89-1744

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT CRAIG and PETER V. PAPPAS,

Defendants-Appellants.

No. 89-1466

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

FRANK P. NORTH, JR., and ESTATE OF JACK E. WALKER,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 74 CR 879—**Brian Barnett Duff**, *Judge.*

ARGUED MAY 16, 1990—DECIDED JULY 16, 1990

Before WOOD, JR., and POSNER, *Circuit Judges*, and CRABB, *District Judge.**

WOOD, JR., *Circuit Judge.* This case began almost twenty years ago with a scandal in the Illinois General Assem-

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* The Honorable Barbara B. Crabb, Chief Judge for the Western District of Wisconsin, is sitting by designation.

bly. For their roles in the scandal, the four individual defendants were variously convicted of mail fraud and travel in interstate commerce with intent to promote an unlawful activity. *See* 18 U.S.C. §§ 1341, 1952. These defendants now have petitioned for a writ of error coram nobis, asking that their convictions be vacated in light of the Supreme Court's decision in *McNally v. United States*, 483 U.S. 350 (1987). The district granted the writ as to Frank P. North, Jr., and the Walker estate but denied the writ as to Robert Craig and Peter V. Pappas. *United States v. Craig*, 703 F. Supp. 730 (N.D. Ill. 1989). As to the Walker estate, we dismiss this case for want of jurisdiction. Because we find coram nobis relief is inappropriate as to the other defendants, we reverse in part and affirm in part.

I. Factual Background

One cubic yard of ready-mix concrete weighs about four thousand pounds, and in 1971, representatives of the ready-mix cement industry wanted to increase the legal load limits of industry trucks by this amount. To meet this goal, the ready-mix industry trade association engaged appellant Pappas as their attorney. Pappas told the trade association that passage of the legislation would cost $5,000 for his fee plus an unspecified amount of money in the future. The unspecified amount soon became $50,000, payable to members of the Illinois legislature.

Terms of payment were then made an issue: was it enough for the bill merely to clear the Illinois General Assembly or did the governor have to approve the legislation before the money became due? An uneasy compromise was reached, and both houses of the General Assembly passed the bill. Not a party to the scheme, the governor then vetoed the proposed legislation, obviously believing that it was not in the best interest of the state of Illinois to have cement trucks rumbling over its highways four thousand pounds heavier. The General Assembly never attempted to override the veto, and the bill never became a law.

Unhappy with the result, the trade association balked at paying anything to state legislators. Because of the unfavorable results, the state legislators offered a discount and agreed to accept only $30,000 for services rendered. Eventually, $15,000 was distributed to various members of the Illinois General Assembly.

For their role in this scandal as members of the General Assembly, a federal district court convicted Craig, North, and Walker of mail fraud; attorney Pappas received similar treatment. In addition, Pappas and Craig were convicted of violations of the Travel Act, 18 U.S.C. § 1952, for causing a member of the trade association to travel to Indiana for the purpose of soliciting bribe money from other trade association members. Pappas received a ten-year sentence and a $10,000 fine; Craig, North, and Walker received five-year sentences and $5,000 fines. On appeal, we affirmed the convictions. *United States v. Craig*, 573 F.2d 455 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978). All four petitioners served their terms of imprisonment, but only Craig completed payment of his fine.

The government sought the mail fraud convictions under the intangible rights theory—that the petitioners had devised a scheme to defraud the citizens of the state of Illinois of their right to the petitioners' loyal, faithful, and honest service as public officers, public employees, and members of the Illinois General Assembly. In *McNally v. United States*, 483 U.S. 350 (1987), the Supreme Court condemned this theory of prosecution, prompting a spate of coram nobis petitions to vacate previous convictions. The petitioners are no exception. Asking that their convictions be vacated, they filed a petition for a writ of error coram nobis with the district court. Because Walker has passed away, his estate has petitioned for relief.

Finding a plethora of continuing civil disabilities for convicted felons in the Illinois statutes, the district court granted coram nobis relief to petitioner North. The Walker estate also received relief on the grounds that Walker's felony conviction precluded his widow from collecting state

pension benefits. As to petitioners Craig and Pappas, however, the district court ruled that their invalid mail fraud convictions did not taint their convictions under the Travel Act. Because the valid Travel Act conviction would support any lingering civil disabilities, *see United States v. Keane*, 852 F.2d 199, 205 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 2109 (1989), the district court denied Craig's and Pappas's petitions. Both the government and the petitioners have appealed from the district court's judgments that were adverse to them.

II. JURISDICTION

A. *Appellate Jurisdiction*

We first pause at a jurisdictional question that neither party brought to the attention of this court. To avoid becoming mired in a swamp of dates, it is sufficient to note that we have appellate jurisdiction over both the government's and the petitioners' appeals only if FED. R. APP. P. 4(a)'s time limits for appeals in civil cases apply. If FED. R. APP. P. 4(b)'s time limits for appeals in criminal cases apply, then both the government's and the petitioners' notices of appeal were untimely, and we have no jurisdiction to hear this case. Thus, the question is which set of time limits should govern coram nobis appeals. Two courts of appeals have applied the time limits for criminal appeals, *Yasui v. United States*, 772 F.2d 1496, 1498-99 (9th Cir. 1985); *United States v. Mills*, 430 F.2d 526, 528 (8th Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971),[1] and

[1] Although both the *Yasui* and *Mills* courts applied the ten-day period for criminal appeals, neither court allowed their holdings to forfeit the defendant's right of appeal. In *Mills*, the court construed the district court's acceptance of the untimely notice of appeal as a grant of additional time for the defendant to proceed with his appeal, *see* 430 F.2d at 528, and rejected the coram nobis petition on its merits, *see* 430 F.2d at 528-31. In *Yasui*, the court remanded the case back to the district court for a finding of whether the appellant could make a showing of excusable neglect

(Footnote continued on following page)

two have applied the time limits for civil appeals, *United States v. Cooper*, 876 F.2d 1192, 1193-94 (5th Cir. 1989) (per curiam); *United States v. Keogh*, 391 F.2d 138, 140 (2d Cir. 1968). We will break the tie and apply the time limits for civil appeals.

It is tempting to resolve this issue as a matter of semantics. In *United States v. Morgan*, 346 U.S. 502, 505 n.4 (1954), the Supreme Court made a passing reference that a motion for a writ of error coram nobis "is a step in the criminal case." From this remark, two courts have deemed that an appeal from such a motion falls under rule 4(b)'s heading of "Appeals in Criminal Cases" and is therefore governed by a ten-day time limit. *See Yasui*, 772 F.2d at 1499; *Mills*, 430 F.2d at 528. It is similarly unsatisfying to classify a coram nobis proceeding as civil and conclude that appeals from a motion for a writ of error coram nobis fall under rule 4(a)'s heading of "Appeals in Civil Cases." *See* 9 J. MOORE, B. WARD & J.D. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 204.15, at 4-132 to -133 (2d ed. 1990) (applying this approach). Rather than decide which set of rules applies on the basis of labels, it is better to decide the issue in light of the particular rule in question.

For example, in *United States v. Balistrieri*, 606 F.2d 216 (7th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980), we examined the need for evidentiary material in a coram nobis proceeding and determined that it was more appropriate to afford the district judge the broad discretion in monitoring discovery that comes with the Federal Rules of Civil Procedure. We observed that a coram nobis proceeding is " 'a hybrid action: quasi-civil and quasi-criminal.' " *Id.* at 221 (quoting *United States v. Tyler*, 413 F. Supp. 1403, 1404-05 (M.D. Fla. 1976)). We will again follow this approach. Instead of broadly classifying a coram nobis ac-

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[1] *continued*
for failing to file a timely notice of appeal. 772 F.2d at 1499-1500. Eventually, the *Yasui* case was dismissed as moot, because the defendant passed away during the proceedings. *See Hirabayashi v. United States*, 828 F.2d 591, 594 n.4 (9th Cir. 1987).

tion as criminal or civil and reasoning from there, we only decide whether it is more appropriate to apply civil or criminal rules to a coram nobis petition in the context of the timeliness of a notice of appeal.

The Federal Rules of Appellate Procedure provide for a thirty-day, sixty days if the government is a party, time limit for appeals in civil cases and a ten-day, thirty days if the government exercises a right to appeal, time limit for appeals in criminal cases. *See* FED. R. APP. P. 4. The shorter time limit for criminal appeals furthers the public interest in the prompt resolution of criminal proceedings. Neither the interests of society nor of individual criminal defendants are served by a plodding appellate process that could change the results of a trial, often while the defendant has already begun to serve a sentence of incarceration. Indeed, as witnessed by the sixth amendment and the Speedy Trial Act, rule 4(b) is just a small part of a larger scheme to ensure that criminal prosecutions do not plod on indefinitely. *See United States v. Hammad*, 709 F. Supp. 334, 336 n.3 (E.D.N.Y. 1989), *aff'd*, 902 F.2d 1062 (2d Cir. 1990).

A petition for a writ of error coram nobis does not present the same concerns. Coram nobis petitions are brought only after a convicted defendant's release from federal custody. *See United States v. Bush*, 888 F.2d 1145, 1147 (7th Cir. 1989). Thus, there is no societal or individual interest in prompt adjudication of the petition while a prisoner is languishing in jail. Where the government is appealing a district court's grant of a writ of error coram nobis, the policies of rule 4(b) are even more removed. The short time limits in rule 4(b) are harsh, and where the policies behind it do not apply, the more relaxed time limits of rule 4(a) should govern the timing of the notice of appeal.

This holding allows a coram nobis petitioner the same time for appeal as a federal prisoner attacking his sentence under section 2255. SECTION 2255 RULE 11 & advisory committee note. The time limits for civil appeals govern a section 2255 motion, even though a section 2255

motion, much like a coram nobis petition, is considered a continuation of a criminal proceeding. *See* SECTION 2255 RULES 1 & 11 advisory committee notes. In the past, we have even analogized a petition for a writ of error coram nobis to a section 2255 motion. *See United States v. Scherer*, 673 F.2d 176, 178 (7th Cir.), *cert. denied*, 457 U.S. 1120 (1982); *United States v. Hedman*, 655 F.2d 813, 817 (7th Cir. 1981). Because a section 2255 motion closely resembles a petition for a writ of error coram nobis, it is best to treat them consistently for the timing of a notice of appeal. *See Cooper*, 876 F.2d at 1194.

We hold that the time limits for civil appeals in FED. R. APP. P. 4(a) govern an appeal from a district court order denying or granting a petition for a writ of error coram nobis. Because both the government and the petitioners met the time limits for a civil appeal, we have jurisdiction to hear the merits of their cases.

B. *Standing of the Walker Estate*

One of the petitioners, however, cannot meet the standing requirements to have a case heard in federal court. Accordingly, we do not have jurisdiction to hear that part of the appeal. In *United States v. Kerner*, 895 F.2d 1159 (7th Cir. 1990), we held that a decedent's estate lacked standing to bring a coram nobis petition on behalf of the decedent, and that holding is dispositive of the Walker estate's appeal.

In *Kerner*, the estate of a late governor of Illinois brought a coram nobis petition to expunge his convictions for mail fraud, perjury, false statements, and tax fraud. Although we determined that the estate met the article III standing requirements, we found that the estate failed to satisfy the court-imposed prudential limitations on the exercise of jurisdiction. *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982). First, we believed that the estate's interests fell outside of the zone of interests protected by the writ of error coram nobis. 895 F.2d at 1162-63. Second, we held

that the estate was impermissibly trying to assert the rights of a third party, namely the rights of the decedent to seek a writ of error coram nobis. *Id.* at 1163.

Predictably, the Walker estate attempts to distinguish its situation from that of the Kerner estate. The Walker estate argues that unlike *Kerner*, Walker's widow is still alive and would be entitled to pension benefits if Walker's conviction is expunged. This argument misses the point. By refusing to hear an estate's petition for a writ of error coram nobis, *Kerner* implicitly holds that the right to seek the writ belongs to the wrongfully convicted individual and dies with that individual. Only one entity could have sought a writ of error coram nobis for Jack Walker, and that entity was Jack Walker himself, before his death.

Furthermore, the Walker estate's petition for a writ of error coram nobis presents standing problems that even go beyond those considered in *Kerner*. The Kerner estate was at least trying to remedy a cognizable injury to itself: it claimed $90,000 worth of injury in the form of fines, penalties, back taxes, and pension forfeiture it lost as a result of the felony conviction. 895 F.2d at 1161-62. The Walker estate is not even trying to remedy an injury to itself; it wants to expunge Walker's felony conviction so that Walker's widow can receive pension benefits. Not only is the Walker estate trying to assert legal rights that belonged to Jack Walker the individual, but it is also trying to assert the rights of Walker's widow. If Mrs. Walker has been wrongfully deprived of her own vested pension benefits, her right to recover those benefits is in a forum different than a petition for a writ of coram nobis by her late husband's estate.

III. Discussion

In our recent coram nobis decisions, we have emphasized that to be successful, the petitioner needs to show lingering civil disabilities from his allegedly wrongful conviction. *See United States v. Bush*, 888 F.2d 1145 (7th Cir. 1989); *United States v. Keane*, 852 F.2d 199 (7th Cir. 1988), *cert. denied*,

109 S. Ct. 2109 (1989). At issue in this case is what it means for a coram nobis petitioner to show that he still suffers from a civil disability.

We do not write on a clean slate in making our decision. In *Bush*, we held that a coram nobis petitioner's desire to obtain a desirable job did not constitute a civil disability. 888 F.2d at 1149. In *Keane*, we held that the possibility of recovering a fine was also not enough to justify coram nobis relief. 852 F.2d at 204. The petitioners in both *Keane* and *Bush* still suffered the adverse effects of their erroneous convictions, but we recognized that our legal system must tolerate the chance of error in order to function. *See Keane*, 852 F.2d at 206. The continual reexamination of old convictions "subtracts from the time available to deal with festering grievances" of today. *Bush*, 888 F.2d at 1150. Considering these systemic interests in finality, we have rejected coram nobis petitions except where there is a concrete threat that an erroneous conviction's lingering disabilities will cause serious harm to the petitioner. Thus, the types of disabilities sufficient to justify coram nobis relief can be broken down into three elements. First, the disability must be causing a present harm; it is not enough to raise purely speculative harms or harms that occurred completely in the past. Second, the disability must arise out of the erroneous conviction.[2] Third, the potential harm to the petitioner must be more than incidental.

As an excellent example of a disability justifying coram nobis relief, we need not look any further than the Supreme Court's opinion resurrecting the writ in *United States v. Morgan*, 346 U.S. 502 (1954). In *Morgan*, the coram nobis petitioner had earlier pleaded guilty to a federal crime and had served a four-year prison sentence.

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[2] This second requirement is also reflected in our rule that if an indictment states one valid offense, then no coram nobis relief is available, "for a single felony conviction supports any civil disabilities. . . ." *Keane*, 852 F.2d at 205.

Id. at 503. Once out of federal custody, the petitioner returned to his wicked ways, running afoul of New York state authorities. Because of his previous federal conviction, the petitioner received an enhanced sentence in state court. *Id.* at 503-04. The petitioner alleged that he never waived counsel in his federal prosecution and, consequently, the conviction was invalid. Because the petitioner could not challenge the federal conviction in New York state courts, *see id.* at 504, the Supreme Court held that a writ of error coram nobis would be an appropriate remedy, *id.* at 512-13. In similar situations, we have also commented that a writ of error coram nobis would be appropriate relief. *See, e.g, Crank v. Duckworth*, No. 89-3626, slip op. at 1-2 (7th Cir. June 25, 1990); *Lewis v. United States*, 902 F.2d 576, 577 (7th Cir. 1990); *Lowery v. Young*, 887 F.2d 1309, 1313 (7th Cir. 1989); *Hicks v. Duckworth*, 856 F.2d 934 (7th Cir. 1988). The three elements of a civil disability all apply to a coram nobis petitioner serving an enhanced sentence because of an allegedly erroneous conviction in another jurisdiction. First, the petitioner is clearly suffering a present harm by languishing in jail. Second, the erroneous conviction has enhanced the petitioner's sentence and thereby caused the harm. Third, enduring a longer prison sentence than justified by law is certainly more than incidental harm. While not the only grounds for coram nobis relief, the facts in *Morgan* provide an instructive example of an appropriate situation for the writ.

Our restrictive view of the writ's availability is not shared by all circuits. Both the Fourth and Ninth Circuits apparently do not require any showing of a disability before a writ of error coram nobis may issue. *See United States v. Walgren*, 885 F.2d 1417, 1421 (9th Cir. 1989) (applying "liberal" presumption that all criminal convictions carry adverse consequences); *United States v. Mandel*, 862 F.2d 1067, 1075 & n.12 (4th Cir. 1988) (all felony convictions impose a status upon the person), *cert. denied*, 109 S. Ct. 3190 (1989); *Hirabayashi v. United States*, 828 F.2d 591, 606-07 (9th Cir. 1987) ("Any judgment of misconduct has

consequences for which one may be legally or professionally accountable."); *see also United States v. McClelland*, 732 F. Supp. 1534, 1537 (D. Nev. 1989) ("In the Ninth Circuit, there is no need for petitioner to show specific adverse consequences that he presently is suffering or that he is likely to suffer in the future.") In dictum, however, the Third Circuit has hinted that it might follow our more restrictive view. *See United States v. Osser*, 864 F.2d 1056, 1060 (3d Cir. 1988) (admitting to some uncertainty as to whether the loss of a pension is a sufficient disability). We noted these differences in *Bush* and observed that the Supreme Court has obviously believed this split among the circuits tolerable. 888 F.2d at 1148-49. Just as we did before, we will continue to adhere to our own precedents until the Supreme Court changes the law or cogent argument convinces us otherwise.[3] *Id.* at 1149.

Turning to the petitioners in the present case, we find that none of them have advanced civil disabilities that would justify the issuance of the writ. The most compelling argument raised is that Pappas seeks the return of his license to practice law. After his conviction, the Illi-

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[3] In taking its less restrictive stance, the Ninth Circuit relied on language in *Sibron v. New York*, 392 U.S. 40 (1968). In *Sibron*, the Supreme Court stated that all criminal convictions were presumed to carry adverse consequences, *id.* at 55-56, but this language must be viewed in its context. The Court was discussing the showing that a criminal defendant must make to prevent his case from becoming moot on direct appeal, and a direct appeal does not present the same finality concerns that arise on a petition for a writ of error coram nobis. The *Sibron* Court only held that the completion of the sentence does not render a criminal appeal moot, *id.* at 50-58, and its decision is inapposite to the issue in this case. Clearly, the completion of sentence does not render a coram nobis petition moot, for that is the only time that such a petition can be brought. The issue here is not mootness but what conditions justify the expenditure of judicial resources to grant the extraordinary writ of error coram nobis. We do not suggest that Craig, Pappas, and North could not have had their cases heard on direct appeal but only that their situation does not justify the issuance of a writ of error coram nobis.

nois Supreme Court disbarred Pappas. *See In re Pappas*, 92 Ill. 2d 260, 442 N.E.2d 142, 65 Ill. Dec. 831 (1982). In *Keane*, we suggested that "this sort of civil disability could support the issuance of the writ," 852 F.2d at 203, but Pappas has not shown either that his conviction is a direct cause of his disbarment or that he has a present desire to apply for reinstatement to the bar.[4] Pappas has not brought to our attention any pending applications for his reinstatement to the Illinois bar, making the possibility of harm only speculative. Even if he had made such an application, coram nobis relief still would not be appropriate. The Illinois disciplinary rules for lawyers soon to go into effect and those in effect at the time of Pappas's disbarment do not discipline lawyers solely for a conviction; they punish for the conduct underlying the conviction. *See* Order of Supreme Court of the State of Illinois on Feb. 8, 1990, rule 8.4, 1990 Ill. Legis. Serv., at R-1 to R-30 (West) (to be codified at ILL. REV. STAT. ch. 110A, following ¶ 774); ILL. REV. STAT. ch. 110A, rules 1-102(a)(3)-(4), 9-101(b) (1987); *see also* ILL. SUP. CT. R. 767(f) (setting forth grounds for reinstatement, none of which include the overturning of a conviction). A writ of error coram nobis could vacate Pappas's conviction, but it could not change the record. Although perhaps not illegal under *McNally*, Pappas's role in the scandal certainly provides grounds for his disbarment. The Illinois Supreme Court is well-equipped to consider the effect of *McNally* on any application Pappas would submit, and there is no indication that a writ of

[4] In his briefs to this court and the district court, Pappas did make several self-serving statements that he desired to seek reinstatement to the Illinois bar. These statements hardly constitute reliable evidence of Pappas's intent. *See Morrison v. Duckworth*, 898 F.2d 1298, 1299 n.1 (7th Cir. 1990) (statements in briefs may not be used to supplement the record). Nevertheless, Pappas could not have simply cured this problem by filing an affidavit and swearing to his intent to seek reinstatement. As explained in the text, the requirement that the threat of harm from the civil disability be immediate requires more than a mere desire to seek reinstatement to the bar.

error coram nobis would lead the court to reinstate Pappas to the practice of law.

As former members of the Illinois General Assembly, both Craig and North assert that a writ of error coram nobis would entitle them to receive legislators' pension benefits taken from them upon conviction. We first note that despite their convictions, Craig and North were entitled to a refund of any contributions they had paid into the pension fund. *See* ILL. REV. STAT. ch. 108½, ¶ 2-156. By virtue of this refund, Craig and North were effectively removed at the time of their conviction as participants in the legislators' pension plan, and basically, they are now asking to be reinstated as plan participants. Any harm to Craig and North for their removal from the pension plan occurred entirely in the past. As we noted above, a writ of error coram nobis is inappropriate where the civil disabilities do not threaten present harm. We think that Craig and North's removal from the pension plan is a sunk cost, much like a criminal fine. If Craig and North lost their right to participate in the pension plan through a 1975 civil judgment, it could not be reexamined at this late date. Just as the possibility of recovering a fine is insufficient to justify the issuance of the writ, *see Keane*, 852 F.2d at 204, so is the possibility of recovering lost pension benefits.

Finally, Craig, North, and Pappas all point toward a cornucopia of disabilities that the Illinois statutes have in store for convicted felons.[5] These disabilities range from the possibility of impeachment as a witness, *see* ILL. REV. STAT. ch. 110, ¶ 8-101, to possible ineligibility for a cigarette distributor's permit, *see* ILL. REV. STAT. ch. 120, ¶ 453.4b(2). For most of these disabilities, it is enough to observe that they are speculative possibilities at best; there has been no showing that any of these disabilities

[5] Upon our examination of the statutes cited to us by the petitioners, we found that several of these statutes had long been repealed.

will cause any of the petitioners to suffer a present harm. A few of these disabilities, however, merit further comment. As to the right to vote, none of the petitioners have alleged that they are currently unable to vote, probably because section 2 of article III of the Illinois Constitution restores the right to vote to felons who have completed their sentences.[6] Recognition of possible future criminal sentence enhancements as grounds for coram nobis relief would be tantamount to judicial recognition that the petitioners intend to commit more crimes—a possibility we absolutely refuse to acknowledge until it occurs. Finally, Craig and North assert that their tainted federal convictions wrongfully deprived them of their seats in the Illinois legislature, a classic example of a past harm that a writ of error coram nobis could not or should not remedy.

IV. Conclusion

We have reaffirmed our holding that estates lack standing to bring coram nobis petitions on behalf of their decedents. We have also stuck to our precedents on coram nobis petitioners' need to show continuing disabilities from their allegedly erroneous convictions. Because we found all of the petitioners' disabilities lacking merit, we have declined to reach the government's alternate argument that Craig's and Pappas's Travel Act convictions can stand independent of any invalid mail fraud counts. Accordingly, the Walker estate's appeal is dismissed for want of subject-matter jurisdiction; the judgment of the district court denying a writ of error coram nobis to Robert Craig and Peter V. Pappas is affirmed; and the judgment of the district court granting a writ of error coram nobis to Frank P. North, Jr., is reversed.

Dismissed in Part,
Affirmed in Part, and
Reversed in Part

[6] We also note that Ill. Rev. Stat. ch. 38, ¶ 1005-5-5 automatically restores, after completion of a term of imprisonment, rights and privileges lost upon conviction.

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Appendix B.

United States Court of Appeals
For the Seventh Circuit

Chicago,Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: November 13,1990

Before: The Honorable:
Harlington Wood,Jr.,Circuit Judge
Richard A. Posner, Circuit Judge
Barbara B. Crabb, Chief District Judge*

No.89-1744
UNITED STATES OF AMERICA,
Appellee
V.
ROBERT CRAIG AND PETER V PAPPAS,
Defendants- Appellants

No. 89-146
UNITED STATES OF AMERICA,
Plaintiff-Appellant
v.
FRANK P. NORTH,JR., AND ESTATE OF
JACK E WALKER,
Defendants-Appellees.

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* The Honorable Barbara B. Crabb, Chief Judge for the Western District of Wisconsin,is sitting by designation.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

No. 74 CR 879,
Judge Brian Barnett Duff

These causes were heard on the record from the above mentioned district court, and were argued by counsel.

On consideration whereof,

IT IS ORDERED AND ADJUDGED by this Court that the Judgement of the District Court in these causes appealed from be, and the same are hereby, DISMISSED for want of subject-matter jurisdiction as to the Walker estate's petition, and the case is REMANDED to the district court with instructions to vacate its previous orders relating to the estate and dismiss the estate's petition; the judgment of the district court denying a writ of error

coram nobis to Robert Craig and Peter V. Pappas is AFFIRMED and the judgment of the district court granting a writ of error coram nobis to Frank P.North,Jr., is REVERSED, in accorance with the order of this Court entered this date.

Appendix C.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
NOVEMBER 13, 1990

Before
Hon. HARLINGTON WOOD, JR. Circuit
Hon. RICHARD A. POSNER, Circuit Judge
Hon. BARBARA B. CRABB, District Judge*

No. 89-1744	)Appeal from
	)the United
UNITED STATES OF AMERICA,	)States District
Plaintiff-Appellee,	)Court of the
vs.	)Northern District
ROBERT CRAIG AND	)of Illinois,
PETER V. PAPPAS	)Eastern Division.
Defendants-Appellants	)
NO. 89-1466	)No. 74 CR 879
	)Brian Barnett Duff,
	)Judge
UNITED STATES OF AMERICA,	)
Plaintiff-Appellant,	)
vs.	)
FRANK P. NORTH, JR. AND	)
ESTATE OF JACK C. WALKER	)
Defendants-Appellees.	)

O R D E R

The slip opinion issued in the above-entitled case on July 16, 1990, is hereby amended.

Page 14, first complete paragraph, the last sentence starting with the word "Accordingly" should read as follows:

> Accordingly, the Walker estate's petition should be dismissed for want of subject-matter jurisdiction and the case is remanded to the district court with instructions to vacate its previous orders relating to the estate and dismiss the estate's petition; the judgment of the district court denying a writ of error coram nobis to Robert Craig and Peter V. Pappas is affirmed; and the judgment of the district court granting a writ of error coram nobis to Frank P. North, Jr., is reversed.

Page 14, last paragraph, should read as follows: "AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS."

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by defendants-appellants and defendants-appellees on July 30, 1990, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing with suggestion for rehearing in banc be, and the same is hereby, DENIED.

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* The Honorable Barbara B. Crabb, Chief Judge For the Western District of Wisconsin, is sitting by designation.

APPENDIX D
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CRAIG ET AL, PETITIONERS,	)	74 CR 879
	)	BRIAN BARNETT DUFF
VS.	)	
	)	DISTRICT JUDGE
UNITED STATES OF AMERICA RESPONDENT.	)	

MEMORANDUM OPINION

On June 25,1976, a federal jury found Robert Craig, Frank P. North, Jr., and Jack Walker guilty of numerous counts of mail fraud and conspiracy, in violation of 18 U.S.C.A. #371 and #1341 (1976). The government obtained these convictions by proving that Pappas had schemed to pass legislation easing weight limits on Illinois highways for cement trucks. He did this by channelling bribes to various officials, including Craig, North, and Walker, who were Illinois legislators. Craig and North also served with Pappas on the Illinois Motor Vehicle Laws Commission, which

Pappas swayed with bribes to recommend favorable legislation. The government argued at trial that this scheme defrauded the citizens and the state of Illinois of their right to the loyal, honest, and faithful services of their public employees. Additionally, the government submitted that Craig and Pappas had violated the Travel Act, codified at 18 U.S.C.A. #1952. The jury agreed.

Following trial, the court sentenced Craig, North, and Walker each to three years imprisonment and a $5,000 fine, and sentenced Pappas to five years imprisonment and a $10,000 fine. The defendants appealed their convictions to the Seventh Circuit, but their appeals proved unsuccessful. See United States v. Craig, 573 F.2nd 455 (1977). The four left for prison and served their sentences. Craig subsequently paid his fine, but the other three did not. Pappas paid

$3,250, and has not paid anything since August, 1987. North paid $1,600, and has not paid anything since December, 1987; while Jack Walker did in 1980, having paid only $200.

Pappas and North feel that they have a good reason for not paying what they owe to the government. In the summer of 1987, the Supreme Court handed down its decision in McNally v. U.S. 107 S.Ct. 2875 (1987). The defendants in McNally were engaged in a kickback scheme involving the awarding of state insurance contracts. The government obtained convictions against the defendants under 18 U.S.C.A. #1341 through use of the same theory of fraud employed in this case: the McNally defendants had deprived the citizens and the State of Kentucky of their right to loyal, honest, and faithful service from their government employees. The Supreme Court, however, reasoned such a right did not constitute property, which it held to be a

necessary element of the crime of mail fraud. The Court thus reversed the convictions.

The acts in this case are no more honorable than those in McNally, but the convictions for the acts are no less illegal. Craig, Pappas, North, and the Estate of Jack Walker thus have petitioned this court for a writ of coram nobis, pursuant to 28 U.S.C.A. 1651(1982). The ask this court to set aside their convictions and return the fines that have they have paid, in light of the holding of McNally. They are not the first people in this Circuit to seek such a writ after having been convicted under the "intangible rights" theory of mail fraud. See, for example, U.S. v. Keane, 852 F.2nd 199(7th Cir. 1988); U.S. v. Bonansinga, 855 F.2d 476 (7th Cir. 1988). As these cases demonstrate, a person does not have the right to obtain the writ merely because a law under which he or she is convicted evolves to the point where such a

conviction would be impossible. Rather, the person must show that the defect in his or her conviction "is the type of defect that would have justified relief during the term of imprisonment," and that it "produces lingering civil disabilities(collateral consequences)." Keane, 852 F.2d at 203.

The petitioners contend that the government's use of the intangible rights theory of mail fraud resulted in a defect that would have justified relief under 28 U.S.C.A. #2255, the federal statute that provides a remedy for those improperly held in federal custody. They argue that the indictments for mail fraud and conspiracy would not have been possible without use of the intangible rights theory, and for that reason their convictions are illegal. Assuming for the moment that this contention is true, the petitions of North and Walker's Estate are the only ones that merit further consideration. This is

because the jury found Pappas and Craig guilty of violating the Travel Act, which provides in part:

> (a) Whoever travels in interstate commerce or uses any facility in interstate . . . commerce, including the mail, with intent to --
>
> > (1) distribute the proceeds of any unlawful activity; or. . .
> >
> > (3) otherwise promote, manage, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this subsection "unlawful activity" means . . . extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

Counts 13 and 14 of the indictment charged Pappas, Craig and others of causing Morris A. Lawereins to travel in interstate commerce between Indianapolis, Indiana, and

the Northern District of Illinois to facilitate the promotion, management, and carrying on of bribery, in violation of Ill. Rev. Stat., ch. 38, # 33-1 (1975). The Supreme Court's rejection of the intangible rights theory of mail fraud in McNally did nothing to change the Illinois crime of bribery, and thus Pappas and Craig's Travel Act convictions are as valid today as they were prior to McNally. For this reason, Pappas and Craig are not entitled to a writ of coram nobis.

North and the Estate of Walker's petitions for the writ present more complicated cases as both North and Walker were convicted only of mail fraud and conspiracy to commit mail fraud. Moreover, the government relied solely upon the intangible rights theory of mail fraud to obtain their convictions. This is itself does not entitle either Walker's Estate of North to

the writ. As the Seventh Circuit noted in Keane, "(a]n indictment adverting principally to rights to faithful service may still lead to a valid conviction if the prosecution shows that the defendant defrauded someone out of property, including intangible property, including intangible property." While that showing need not be one that would overcome objections to the prosecution's case on direct appeal, the statement of any offense in the indictment marks "the end of things for relief in the nature of coram nobis." Keane, 852 F.2d at 205. See also Bonansinga, 855 F.2d at 478-9 (refusing to grant writ of coram nobis where indictment supported conviction for mail fraud after stripping out the intangible rights theory).

The government contends that North and Walker did scheme to defraud someone out of property -- namely, the citizens and the State of Illinois. The government contends that it

takes "little imagination" to concluded that the bribery scheme would have deprived the citizens and the State of Illinois of good roads, since having heavier cement trucks on the highways would have led to incrementally greater road damage.

It takes even less imagination to describe the government's theory of fraud as attenuated. The government has cited no cases in support of its theory, which has a long and brittle chain of causation. The indictment does not allege that the five representatives and the three senators involved in this case or the Illinois Motor Vehicle Laws Commission had control over the State's roads. According to the indictment, the Commission

> had the authority and duty to study and investigate . . . the laws of illinois relating to the operation of motor vehicles and the transportation of persons and property by motor vehicles, the said Commission had the authority and duty to study and investigate . . . the construction and condition of the highways of Illinois and the

> effect upon such highways resulting from the operation of vehicles of different types, sizes and weights; the said Commission had the authority and duty to report its findings, conclusions and recommendations to the (Illinois) General Assembly.

At most, the Commission had the ability to influence the disposition of the State's property, but actual control over the property lay elsewhere. Similarly, eight members of the Illinois legislature certainly had to power to influence the state's laws, but nothing in the indictment states that they had control over those laws. The lack of power that these individuals had over Illinois roads is evidenced by the ultimate disposition of their corrupt bill, which Governor Richard J. Ogilvie vetoed.

It is evident from the indictment that the only things which these defendants controlled were their own votes and recommendations. At trial the government

accused these men of depriving the citizens and the State of Illinois of their right to have these votes cast, and these recommendations made, honestly. These powers and duties, however, did not amount to sufficient control over the state's highways allow these defendants to dispose of that control, either properly or improperly. To this extent this case differs from every other post-McNally mail fraud case in which the Seventh Circuit has upheld a conviction. See United States of America v. Folak. No.88-1038 (7th Cir. Dec. 19,1988) (sheriff's deputy pocketed moneys or seized inventories of delinquent taxpayers, which belonged to the state); U.S. v. Bailey, 859 F.2d 1265, 1275-78 (7th Cir, 1988 (bank president artificially inflated bank's net worth to stave off regulatory foreclosure, thereby putting depositors and government's property at risk; president also depleted bank's assets for

personal gain); Bonansinga, 855 F.2d at 476 (utility official took government's paint and auto parts for his own benefit); U.S. v. Eckhardt, 843 F.2d 989(7th Cir. 1988 (defendant misrepresented investment opportunity and invested money in a manner which led to tax and investment losses for investors); U.S. v. Wellman, 830 F.2d 1453 (7th Cir. 1987) (defendant misrepresented conformance of storage tanks to government regulations, thereby overcharging buyer and causing buyer to incur costly repairs).

The closest case to this one is Keane, where defendant Keane used his position as Chairman of the Finance Committee of the Chicago City Council to "induce" the passage of legislation and governmental land purchases that favored partnerships in which he had an interest. A closer look at Keane, however, reveals that the Seventh Circuit had stronger bases for upholding a mail fraud conviction in

that case. First, the Seventh Circuit held that apart from the inducements, Keane profited from confidential information in which the City of Chicago had a property interest. Second, Keane's power to influence the passage of favorable legislation was greater than that possessed by the conspirators here. The government proved at Keane's trial that as Finance Chairman, Keane had effective control over requirements for reserve bids at City tax assessment auctions. See United States v. Keane, 522 F.2nd 534, 540-41 (7th Cir. 1975). By contrast, the conspirators in this case were never sure that their efforts would result in favorable legislation. Third, Keane contacted "friends" who were in charge of discretionary purchases of properties for various governmental agencies, and persuaded them to buy land in which he had an interest at inflated prices. See id. at 541-44. The government never

alleged or proved comparable actions in this case.

This court concluded that the indictment charged nothing more (and nothing less) than the corruption of the legislative fact-gathering and law-making process, and not the taking of the State's property. The indictment insufficiently alleged mail fraud, and thus North and Walker would be entitled to relief under # 2255 if they were in federal custody today. This court now turns to the second element that is necessary before this court can issue a writ of coram nobis; whether North and the Estate of Walker are suffering lingering civil disabilities as a result of these convictions. As the court in Keane noted, there are many "substantial civil disabilities" that can attach to a criminal conviction. "These include loss of the rights to vote, hold occupational licenses (including law licenses), and bear arms; criminal

convictions also may lead to enhanced penalties for offenses." The court in Keane agreed that the writ of coram nobis was a proper means to remove these disabilities. Keane, 852 F.2d at 203.

Keane's counsel on his petition for a writ of coram nobis told the court that the 80-year-old Keane was no longer under any civil disability, and the court relied on this admission as one of its alternative reasons for denying issuance of the writ. Id. at 203-04,206. North submits, however that he is under several civil disabilities. See Ill.Rev.Stat. ch.110-1/2, ## 6-13(a), 9-1, 11-3(a), 11-5(a)(Smith-Hurd Ann.1987) (impliedly excluding a person convicted of a felony from serving as an executor, administrator, or guardian in a probate matter); id. at Chap. 108 1/2, ##2-156, 14-149 (prohibiting payment of state pension to former legislators or state employees who have been convicted of a

felony arising out of their public service); id. at ch. 17, #1469(2) (convicted person may not obtain license for business of renting safety deposit vaults);id. at ch.121, #307.9 (state police); id. at ch. 17, #5305(2) (license for financial planning/management business); id. at ch.32, #360.7(4) (license for non-profit consumer credit counselling corporation); id. at ch.8,#37-6(b) (director of Illinois Racing Board); id. at ch.21, #64.10 (cemetery license); id. at ch. 24, #3-6-5 (appointment as auxiliary police officer); id. at 6-3-9 (election to certain municipal offices; id., at ch. 56 1/2, #242.2 (license for slaughtering, processing, raising, or breeding certain animals); id., at ch. 85, #2303 (license to run raffle).

The government argues that North has not shown a "present" disability as a result of any of these laws, and that Keane stands for proposition that the chance of "future"

disability is insufficient to support issuance of the writ. This court disagrees. The language from Keane that this court quoted above explicitly states that a petitioner can seek relief from the prospective prohibitions of state occupational regulations and the possibility of an enhanced sentence upon a future conviction. We attribute the Keane court's refusal to grant the writ in that case to the presence of the strong alternative grounds for not issuing the writ, Keane's reinstatement to the Illinois bar, his express admission of the absence of disabilities in his case, and the unlikelihood of his changing occupations at the age of eighty years.

North is thus entitled to a writ of coram nobis. The petition of the Estate of Walker creates a more difficult problem, as Walker himself is no longer suffering civil disabilities from his conviction. Judge Plunkett recently held in United States of

America v. Otto Kerner, Jr., 1988 U.S.Dist. LEXIS 7605 (N.D. Ill July 14, 1988) that an estate's interest in clearing the name of a decedent or recovering fines paid by the decedent during his lifetime did not constitute a continuing civil disability under Keane. This case, however, is different: as a result of Jack Walker's conviction, his widow cannot collect a state pension. See Ill. Rev. Stat. ch. 108 1/2, ## 2-121-121.1 (spouse of deceased participant in state pension plan collects 66 2/3% of participant's share until spouse's death); at ## 2-156, 14-199 (former legislators and state employees cannot collect state pension if convicted of felony).

Keane correctly ascertained the competing interests in cases such as these: the interest of society in the finality of judgments, and the interest of the person in having civil disabilities stemming from an

erroneous conviction removed. This court does not perceive a threat to the former interest in a case like this one, where a person who suffers a tangible loss from the erroneous criminal conviction of another person seeks to have that error corrected. Mrs. Walker might have alternative ways of obtaining her pension in this case, but Keane in no way requires exhaustion of remedies prior to the issuance of a writ of coram nobis. Rather, Keane requires a petitioner to establish only the fact of the error and the need for removal of a certain disability. Those conditions are met in this case, and as a result this court will grant the Estate of Walker its petition for the writ.

A final note: Those not familiar with the requirements for the writ of coram nobis may find the outcomes of the post-McNally cases for federal relief bewildering. Even in the petitions presently before this court

one sees relief granted to two who received bribes and betrayed their public offices, and relief denied to two who committed the same acts but unluckily crossed state lines while doing so. It must be emphasized that in each of these petitions the issue is not whether the petitioners acted rightly or wrongly, in the moral sense of right and wrong. Rather, these petitions test the limits of the power of the United States Government to punish persons who, at least in this case, committed what surely are crimes under state law. It is those limits that are confusing, and perhaps lacking in coherence. Nevertheless, it is the duty of this court to police those limits, even if it means removing sanctions from those who in some sense deserve them. It is not North and Walker who are being vindicated here, but rather the rule of law.

The petitions of Robert Craig and Peter V. Pappas for a writ of coram nobis are

denied, and the petitions of Frank P. North, Jr. and the Estate of Jack E. Walker are granted.

ENTER;

/s/ Brian Barnett Duff

BRIAN BARNETT DUFF

UNITED STATES DISTRICT COURT

DATE: January 6, 1988 (sic).

SUPPLEMENTAL ORDER

Entered Feb 28, 1989

ORDER:

Robert Craig and Peter V. Pappas have moved pursuant to Rule 59, Fed.R. Civ.Pro., to ask this court to alter or amend the judgment entered in this case on January 6, 1989. They contend that this court erred in evaluating the sufficiency of their convictions under the

Travel Act, 18 U.S.C.A. # 1952 (1982), in light of the decision in McNally v. U.S., 107 S.Ct. 2875 (1987). Specifically they submit that because McNally would have prevented the United States from prosecuting them for mail fraud under 18 U.S.C.A. #1341 and conspiracy to commit mail fraud in violation of 18 U.S.C.A. #371, the United States could not have prosecuted them for violating the Travel Act either.

Craig and Pappas rely heavily upon the governments's arguments at trial and on appeal in demonstrating that their convictions under the Travel Act were inextricably entwined with their now-improper convictions for mail fraud and conspiracy. But the government's actual characterization of the charges facing Craig and Pappas are immaterial for purposes of this court's determination as to Craig and Pappas's entitlement to a writ of coram nobis. Rather, as the Seventh Circuit observed in U.S. v.

Keane, 852 F.2d 199,204 (7th Cir.1988), a person is entitled to the writ only if he or she would have been entitled to relief under 28 U.S.C. #2255(1982)--namely, upon a claim that he or she received a sentence "imposed in violation of the Constitution of the United States."

Craig and Pappas allege that the constitutional error in this case is an insufficient indictment. The court in Keane observed that a conviction pursuant to an indictment violates the Constitution only if it fails to state an offense. See Keane, 852 F.2d at 204. As this court noted in its previous judgment, the indictment in this case stated an offense under the Travel Act, even after McNally. See United States v. Robert Craig, No. 74 CR 8798, mem. op. 3-5 (N.D. Ill. Jan 6, 1989)

Craig and Pappas contend that they were found guilty of violating the Travel Act

because of their participation in a conspiracy, and not as a result of any direct acts on their part. They argue further that since they could not have been convicted of the conspiracy counts obtained in the indictment, they could not have been found guilty by reason of a conspiracy theory under the Travel Act. Craig and Pappas's argument is flawed, however. That the government could not have sought convictions of Craig and Pappas for conspiracy to violate the mail fraud statute does not mean that the government, by the indictment, could not have charged, or that the jury could not have later found, that a conspiracy existed. Conspiracies can exist regardless of whether they violate 18 U.S.C. #371.

Had the indictment charged that the underlying criminal act in the Travel Counts against Craig and Pappas was a conspiracy to commit mail fraud in violation of 18 U.S.C.

#371, Craig and Pappas's present argument would have merit. But as noted in its earlier opinion, the Travel Act convictions rested on acts taken in furtherance of a scheme to violate the Illinois bribery laws, not federal law. For this reason, this court denies Craig and Pappas's motion to alter or amend its judgment of January 6, 1989.

/s/ Brian Barnett Duff

SUPPLEMENTAL ORDER

ORDER:

Robert Craig, Peter V. Pappas, Frank P. North, and the Estate of Jack E.Walker have petitioned this court to supplement the record. The Petitioners are working on appeals

of this court's earlier ruling on this matter, see principally Craig v. U.S., 703 F. Supp. (N.D. Ill. 1989), and discovered while developing their arguments materials from the trial of their criminal cases. The petitioners believe that these materials strengthen their claims for a writ of coram nobis. The Seventh Circuit Court of Appeals thus has remanded this matter to this court for review of the materials.

The petitioners specifically want the court to review 68 pages of the transcript of their trial, Tr. 5710-78, which contains the charge of the trial court judge, Judge George Leighton, to the jury. Judge Leighton's charge only confirms this court's earlier conclusion in Craig, 703 F.Supp. at 732, and its later reconsideration of Craig in United States v. Craig, NO. 74 CR 879,Minute Order (N.D. Ill. Feb. 28,1989), that the jury in this matter properly convicted Craig and

Pappas of violating the Travel Act, 18 U.S.C. #1952 (1976). Craig and Pappas's convictions rested on acts taken in furtherance of a scheme to violate the Illinois bribery laws. After instructing the jury to give separate consideration to each count, Judge Leighton first described the general law regarding conspiracy. While he introduced this charge while talking about Count 1, a claim of conspiracy to commit mail fraud, conspiracy theories were applicable to the Travel Act counts as well. Judge Leighton told the jury, what a conspiracy was, how it could be formed, and how it was possible for there to be several conspiracies. See Tr. 5718, 5721-27, 5730-32.

After charging the jury on Counts 1-12, Judge Leighton turned to Counts 13-14, the Travel Act counts. He read the Act and its definition on unlawful activity, which included bribery. Previously he had read the

jury the Illinois bribery statute, Ill. Re. St. ch. 38 # 33-1 (1975), and so the jury knew that acts taken in furtherance to violate that statute could lead to criminal liability under the Travel Act. Judge Leighton then told the jury that liability could fall on any defendant who knowingly "became a member of the bribery scheme." if that scheme resulted in a member of the scheme travelling in interstate commerce to further the scheme. The court's pointed use of the word "scheme" suggested use of the conspiracy theories which the court had described to the jury earlier. See Tr. 5734-61.

Judge Leighton's charge also confirms this court's view that the government impermissibly obtained convictions against North and Walker for committing mail fraud and conspiring to commit mail fraud, acts in violation of 18 U.S.C. 1341 and 371 (1976) respectively. At Tr. 5751, Judge Leighton

told the jury: "The object of the scheme to defraud (in violation of the mail fraud laws) need not be money, or any form of tangible property." The government's theory of liability thus rested on a view of property rejected by the Supreme Court in McNally v. U.S., 483 U.S.350 (1987). For this reason, and the others expressed in Craig, 703 S.Supp. aT 732-35, the court holds that North and the Estate of Walker are entitled to a writ of coram nobis.

The petitions of Craig and Pappas for a writ of coram nobis are again denied, and the petitions of North and the Estate of Walker reaffirmed.

/s/ Brian Barnett Duff

(2)

No. 90-1320

Supreme Court, U.S.
FILED
APR 22 1991
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In the Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT CRAIG, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether petitioners are entitled to writs of error coram nobis vacating their mail fraud convictions because the jury instructions were erroneous under *McNally* v. *United States*, 483 U.S. 350 (1987), even though the indictment stated an offense, the evidence at trial was sufficient to support the convictions, and petitioners do not suffer from continuing civil disabilities.

2. Whether the court of appeals correctly held that the Estate of Jack E. Walker, a petitioner, lacks standing to apply for a writ of error coram nobis on behalf of the decedent.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 907 F.2d 653. The opinion of the district court (Pet. App. 22-42) is reported at 703 F. Supp. 730.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1990. The judgment was amended and a petition for rehearing was denied on November 13, 1990. Pet. App. 16a-21a. The petition for a writ of certiorari was filed on February 5, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1976, petitioners Craig, North, and Pappas, and codefendant Jack E. Walker were convicted of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371 and 1341. Pet. App. 2. In addition, Craig and Pappas each were convicted on 11 counts of mail fraud; Walker was convicted on three counts of mail fraud; and North was convicted on two counts of mail fraud. Craig and Pappas were also convicted on two counts of violating the Travel Act, 18 U.S.C. 1952. Pappas was sentenced to ten years' imprisonment and fined $10,000; Craig, North, and Walker were each sentenced to five years' imprisonment and fined $5,000. The court of appeals affirmed the convictions. *United States* v. *Craig*, 573 F.2d 455 (7th Cir. 1977), cert. denied, 439 U.S. 820 (1978). Pet. App. 3.

In 1987, after this Court held in *McNally* v. *United States*, 483 U.S. 350 (1987), that the mail fraud statute did not apply to certain schemes involving the deprivation of intangible rights, petitioners applied for writs of error coram nobis to vacate the convictions. The district court granted the applications of North and Walker's estate, but it denied the applications of Craig and Pappas. Pet. App. 22-50. The court of appeals affirmed the denial of coram nobis relief to Craig and Pappas, reversed the granting of relief to North, and dismissed the application of Walker's estate for want of jurisdiction. Pet. App. 1-18.

1. The evidence at trial, which is detailed in the court of appeals' opinion on direct appeal, showed that Craig, North, Pappas, and Walker participated in a scheme to bribe state legislators to pass a bill that would permit cement trucks to carry heavier weights on Illinois highways. In 1971, representa-

tives of the ready-mix cement industry wanted to increase by 4,000 pounds the weight of cement that trucks could lawfully carry on the State's highways. The industry trade association hired Pappas, who was a representative to the Illinois Motor Vehicle Commission, as their attorney. Pappas told the trade association that the passage of the legislation would cost $5,000 for his fee plus an unspecified amount of money in the future. The unspecified amount turned out to be $50,000 to be paid as bribes to members of the Illinois legislature. Although the bill was passed by both houses of the General Assembly, the governor vetoed it. When the trade association subsequently balked at paying anything to the state legislators, the legislators agreed to accept only $30,000. Eventually, $15,000 was distributed to various state legislators. Craig, North, and Walker were among the members of the General Assembly who received payments for their assistance in passing the bill. Pet. App. 2-3; *United States* v. *Craig*, 573 F.2d at 463-473.

The indictment and jury instructions on the conspiracy and mail fraud counts were predicated on the theory that Pappas, Craig, North, and Walker had devised a scheme to defraud the citizens of Illinois of their right to the loyal, faithful, and honest service of the members of the Illinois General Assembly. After their convictions were affirmed in 1977, Pappas, Craig, North, and Walker served their terms of imprisonment. Walker died in 1980. Pet. App. 3.

2. In *McNally*, this Court held that mail fraud convictions could not be based on the theory that public officials' conduct had deprived the citizens of their intangible right to honest and impartial government, which the Court concluded was not a property inter-

est protected by the statute.[1] Thereafter, petitioners filed a joint coram nobis petition asking that the convictions be set aside and that the government return the fines that had been paid. Pet. App. 3.

After concluding that the conspiracy and mail fraud convictions were invalid in light of *McNally*, the district court granted coram nobis relief to North and to Walker's estate. It found that North was entitled to relief because he was subject to a variety of continuing disabilities imposed on convicted felons under state law, and that Walker's estate was entitled to relief because Walker's felony conviction precluded his widow from collecting state pension benefits. Pet. App. 22-26, 28-42. But the district court denied the applications of Pappas and Craig. The court noted that both Craig and Pappas had been convicted on two counts of violating the Travel Act in addition to conspiracy and mail fraud. It explained that "[t]he Supreme Court's rejection of the intangible rights theory of mail fraud in *McNally* did nothing to change the Illinois crime of bribery," which served as the unlawful activity underlying the Travel Act counts, "and thus Pappas and Craig's

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[1] Congress has since amended the federal fraud statutes to provide that a "scheme or artifice to defraud includes a scheme or artifice to deprive another of the intangible right to honest services." 18 U.S.C. 1346, added by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508. The legislative history of that provision explains that "[t]his section overturns the decision in *McNally* v. *United States* * * *. The intent is to reinstate all pre-*McNally* case-law pertaining to the mail and wire fraud statutes without change." 134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988) (statement of Sen. Biden); see also *id.* at 33,297 (1988) ("it is no longer necessary to determine whether or not the scheme or artifice to defraud involved money or property") (statement of Rep. Conyers).

Travel Act convictions are as valid today as they were prior to *McNally*." Pet. App. 28. Because any lingering civil disabilities would continue on account of their Travel Act convictions, the court concluded that Pappas and Craig were not entitled to coram nobis relief. *Id.* at 26-28, 42-50.

3. The court of appeals ruled that none of the petitioners was entitled to coram nobis relief. Pet. App. 1-18. Relying on its decision in *United States* v. *Kerner*, 895 F.2d 1159 (7th Cir. 1990), the court first held that Walker's estate lacked standing to bring a coram nobis petition on behalf of the decedent. It therefore dismissed the application of Walker's estate for coram nobis relief for want of jurisdiction. Pet. App. 7-8, 16-21.

Relying on its decision in *United States* v. *Keane*, 852 F.2d 199 (7th Cir. 1988), cert. denied, 490 U.S. 1084 (1989), the court of appeals ruled that the other three petitioners had failed to establish any lingering civil disabilities resulting from their convictions that would justify coram nobis relief. Pet. App. 8-14. It found Pappas's claim that he was unable to regain his license to practice law as a result of his convictions to be "speculative" because Pappas had "not shown either that his conviction is a direct cause of his disbarment or that he has * * * any pending applications for his reinstatement." *Id.* at 12. The court also noted that the state disciplinary rules for lawyers "do not discipline lawyers solely for a conviction; they punish for the conduct underlying the conviction." *Ibid.* It thus concluded that coram nobis relief would not be appropriate even if Pappas had applied for reinstatement because, "[a]lthough perhaps not illegal under *McNally*, Pappas's role in the scandal certainly proves grounds for his disbarment." *Ibid.*

The court likewise found that neither Craig nor North had shown any lingering civil disabilities threatening present harm as a result of their convictions. It rejected their claim that coram nobis relief was justified to allow them to receive pension benefits taken from them upon their convictions. After noting that Craig and North had been entitled to a refund of any contributions paid into the plan, the court stressed that "[a]ny harm to Craig and North for their removal from the pension plan occurred entirely in the past" and "is a sunk cost, much like a criminal fine." Pet. App. 13.[2]

Finally, the court rejected the claim of Pappas, Craig, and North that the "cornucopia of disabilities that the Illinois statutes have in store for convicted felons" justified coram nobis relief. Pet. App. 13. The court explained: "For most of these disabilities, it is enough to observe that they are speculative possibilities at best; there has been no showing that any of these disabilities will cause any of the petitioners

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[2] In *United States* v. *Keane*, 852 F.2d 199, 204 (7th Cir. 1988), cert. denied, 490 U.S. 1084 (1989), the court had stated that a criminal fine "is a sunk cost rather than a continuing disability producing additional injury as time passes." The court explained that if a civil fine had been entered against a defendant there would be no basis for reopening the judgment after it became final, and held that "the prospect of getting money back is not enough by itself to support belated review" pursuant to the extraordinary writ of error coram nobis, which exists to remedy fundamental miscarriages of justice. *Ibid.* Although petitioners North and Pappas never completed payment of their criminal fines, the court below apparently assumed that it made no difference whether the fine had been paid or not, since neither the reviewability of a civil judgment nor the fundamental character of the alleged error would depend on whether payment had been made.

to suffer a present harm." *Id.* at 13-14. The court accordingly affirmed the denial of coram nobis relief to Pappas and Craig, and it reversed the granting of such relief to North.

ARGUMENT

1. Petitioners contend (Pet. 8-15) that this Court should grant the petition for a writ of certiorari to resolve the conflict among the circuits concerning whether a person who suffers no current civil disability as a result of an invalid mail fraud conviction is entitled to coram nobis relief.

a. In our brief acquiescing in the certiorari petition in *Keane* v. *United States*, No. 88-1178, and in our petition for a writ of certiorari in *United States* v. *Mandel*, No. 88-1759, we urged the Court to resolve the conflict on this issue. The Court, however, denied certiorari in both cases. *United States* v. *Keane*, 852 F.2d 199 (7th Cir. 1988), cert. denied, 490 U.S. 1084 (1989); *United States* v. *Mandel*, 862 F.2d 1067 (4th Cir. 1988), cert. denied, 491 U.S. 906 (1989). Nothing has occurred since this Court denied certiorari in those cases that would make review in this case more appropriate.

b. In any event, apart from the court of appeals' conclusion that petitioners suffer from no current civil disabilities as a result of their convictions, petitioners are not entitled to coram nobis relief for at least two other reasons. First, both Pappas and Craig were convicted on two Travel Act counts for inducing another person to travel from Indiana to Illinois to further the scheme to bribe members of the General Assembly in violation of state law. As the district court noted in denying relief to Pappas and Craig, those "Travel Act convictions are as valid today as

they were prior to *McNally*." Pet. App. 28. Since those valid convictions would support any lingering civil disabilities from which Pappas and Craig claim to suffer, they are not entitled to coram nobis relief.

In addition, petitioners are not entitled to coram nobis relief because their conspiracy and mail fraud convictions do not amount to a miscarriage of justice. To be sure, since the indictment and the jury instructions were predicated on the intangible rights theory invalidated by *McNally*, petitioners would have been entitled to reversal of their convictions on direct appeal. As the Court explained in *United States* v. *Morgan*, 346 U.S. 502 (1954), however, the scope of coram nobis relief is considerably more limited. In *Morgan*, the Court stated that not all errors, but only those "of the most fundamental character," warrant coram nobis relief. *Id.* at 512 (quoting *United States* v. *Mayer*, 235 U.S. 55, 69 (1914)).[3] The Court also emphasized that the "[c]ontinuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice." 346 U.S. 511. See also *Davis* v. *United States*, 417 U.S. 333, 346 (1974) (ruling that an intervening change in substantive law should be applied on collateral attack only if, under the change in the law, a conviction amounts to a "miscarriage of justice").

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[3] In the related context of habeas corpus review, the Court has described the sort of "fundamental miscarriage of justice" warranting collateral review in spite of a procedural default as an error that "probably has caused the conviction of one innocent of the crime." *McCleskey* v. *Zant*, No. 89-7024 (Apr. 16, 1991), slip op. 25.

In this case, the defect in the indictment and the jury instructions did not amount to fundamental error since petitioners' scheme clearly would have resulted in a loss of property to the State of Illinois within the meaning of *McNally*. The scheme to bribe state legislators in return for their support of legislation to increase the weight limit on trucks carrying cement necessarily contemplated damage to the state highways, for more weight on the roads would obviously cause more damage over time. The State of Illinois would therefore have been deprived of its tangible property interest in protecting state roads, and the citizens of the State would have been deprived of tax dollars to pay for the increased road damage. Accordingly, since the bribery scheme clearly contemplated an ultimate loss to Illinois and its citizens of property within the meaning of *McNally*, petitioners' conspiracy and mail fraud convictions do not rest on any fundamental error entitling them to coram nobis relief.

2. Petitioner Estate of Jack E. Walker contends (Pet. 15-17) that the court of appeals improperly dismissed its application for coram nobis relief on the ground that it lacked standing. That claim does not warrant review, particularly in the circumstances of this case where the application would lack merit in any event for the reasons we have just stated.

Based on its earlier decision in *United States* v. *Kerner*, *supra*, the court of appeals correctly concluded that petitioner lacked standing to seek coram nobis relief on behalf of the decedent. Pet. App. 7-8. The court explained in *Kerner* that "the narrow 'zone of interests' protected by the writ [of error coram nobis] includes only the [defendant's] right to be free from any lingering civil disabilities remaining from his arguably wrongful conviction." 895

F.2d at 1163. The court also noted that "a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.' ". *Ibid.* (quoting *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975)). Consequently, as the court in *Kerner* went on to conclude, "an estate lacks standing to bring a petition for writ of error coram nobis because it is outside the 'zone of interests' protected by the writ." 895 F.2d at 1163.

In any event, it is settled law that a criminal case abates upon the death of the defendant. See *Durham* v. *United States*, 401 U.S. 481, 483 (1971); *Menken* v. *Atlanta*, 131 U.S. 405, 405 (1889); *United States* v. *Dudley*, 739 F.2d 175, 176 (4th Cir. 1984). The same principle applies in the case of collateral attacks on criminal convictions. See, *e.g.*, *McMann* v. *Ross*, 396 U.S. 118 (1969) (per curiam); *Mintzes* v. *Buchanon*, 471 U.S. 154 (1985); *Warden* v. *Palermo*, 431 U.S. 911 (1977); see also *United States* v. *Oberlin*, 718 F.2d 894 (9th Cir. 1983). Since a petition for a writ of error coram nobis is but "a step in the criminal process" and "is of the same general character as [a motion for collateral relief] under 28 U.S.C. § 2255," *United States* v. *Morgan*, 346 U.S. at 505-506 n.4, it follows that any request for coram nobis relief after Walker's death was moot. For that reason, the dismissal of the Estate's application for coram nobis relief on the decedent's behalf was proper.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

APRIL 1991

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